(3)

Supreme Court, U.S.
FILED
MAR 4 1996
CLERK

No. 95-1063

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM B. BLOUNT, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

RICHARD H. WALKER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Principal Assistant General Counsel

MARK PENNINGTON
Senior Litigation Counsel
Securities and Exchange Commission
Washington, D.C. 20549

26 pp

QUESTIONS PRESENTED

1. Whether Municipal Securities Rulemaking Board Rule G-37, which restricts the ability of municipal securities dealers to engage in certain types of municipal securities business if they make campaign contributions to (or solicit or coordinate contributions on behalf of) state and local officials who can influence the award of that business, violates the First Amendment rights of municipal securities dealers.

2. Whether the Rule's restrictions impermissibly intrude upon the power of the States to control their own elections, in violation of the Tenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985)	20
Buckley v. *Valeo*, 424 U.S. 1 (1976)	12, 13, 14, 15, 17, 18
Carver v. *Nixon*, 72 F.3d 633 (8th Cir. 1995), pet. for cert. pending, No. 95-1258	16
FEC v. *Colorado Republican Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995), cert. granted, 116 S. Ct. 689 (1996)	19
FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985)	12
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982)	13, 15
Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)	11
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	19-20
New York v. *United States*, 505 U.S. 144 (1992)	11
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989)	16
United States Civil Serv. Comm'n v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973)	13
United States v. *Naftalin*, 441 U.S. 768 (1979)	14

Constitution, statutes and regulations:

U.S. Const.:	
Amend. I	2, 7, 12
Amend. X	2, 8, 10, 11, 19, 20

Statutes and regulations—Continued: Page

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621-634 (1988 & Supp. V 1993) 20
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:
§ 3(a)(4), 15 U.S.C. 78c(a)(4) 4
§ 3(a)(5), 15 U.S.C. 78c(a)(5) 4
§ 3(a)(29), 15 U.S.C. 78c(a)(29) 3
§ 3(a)(30), 15 U.S.C. 78c(a)(30) 4
§ 15(a)(1), 15 U.S.C. 78*o*(a)(1) 3
§ 15B(a), 15 U.S.C. 78*o*-4(a) 3
§ 15B(b), 15 U.S.C. 78*o*-4(b) 3
§ 15B(b)(2), 15 U.S.C. 78*o*-4(b)(2) 2
§ 15B(b)(2)(C), 15 U.S.C. 78*o*-4(b)(2)(C) 3
§ 15B(c)(1), 15 U.S.C. 78*o*-4(c)(1) 3
§ 19(b), 15 U.S.C. 78s(b) (1988 & Supp. V 1993) .. 5
§ 25, 15 U.S.C. 78y (1988 & Supp. V 1993)..... 7, 11
§ 27, 15 U.S.C. 78aa 11
2 U.S.C. 431(17) 18
2 U.S.C. 441c (a)(1) 18
2 U.S.C. 441c (a)(2) 18
Ariz. Rev. Stat. Ann. (1995):
§ 16-919 18
§ 16-921(B) 18
Conn. Gen. Stat. Ann. § 9-333*o*(a) (West 1995) 18
1995 Ct. ALS 188 (to be codified at Conn. Gen. Stat. Ann. § 1-84(n)) 18
N.D. Cent. Code (1991):
§ 16.1-08-01(10) 18
§ 16.1-08-02(1) 18
Pa. Stat. Ann. tit. 25 § 3253 (1994)..... 18
S.D. Codified Laws Ann. § 12-25-2 (1995)..... 18
W. Va. Code:
§ 3-8-8 (1994)..... 18
§ 3-8-12(d) (1995)..... 18
§ 3-8-12(h) (1995)..... 18
Wis. Stat. Ann. (West 1986 & Supp. 1995):
§ 11.29 18
§ 11.38 18
Wyo. Stat. § 22-25-102 (1992)..... 18

Regulations—Continued: Page

11 C.F.R. 115.2 18
Fla. Admin. Code Ann. r.:
9I-16.004(e) 18-19
19A-6.004 18

Miscellaneous:

Morning Edition: SEC Halts Political Campaign Funding from Wall Street (National Public Radio Broadcast, June 1, 1994) 15
Securities Acts Amendments of 1975: Report of the Committee on Banking, Housing, and Urban Affairs, to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. (1975) 3

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1063

WILLIAM B. BLOUNT, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 61 F.3d 938. The order of the Securities and Exchange Commission approving Municipal Securities Rulemaking Board Rule G-37 (Pet. App. B1-B60) is reported at 56 SEC Docket 1045.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1995, and a petition for rehearing was denied on October 4, 1995 (Pet. App. F1). The petition for a writ of certiorari was filed on January 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks review of the court of appeals' judgment upholding the Securities and Exchange Commission's decision approving Municipal Securities Rulemaking Board (MSRB) Rule G-37. The Rule is aimed at ending the widespread practice colloquially known as "pay-to-play." That practice involves securities dealers' making of campaign contributions to officials of state and local issuers of municipal securities in return for being considered for, or awarded, municipal securities business. When pay-to-play prevails, business is awarded on the basis of political influence rather than merit, and the market for municipal securities is distorted and corrupted.

Rule G-37 restricts the ability of dealers to do business with issuers when the dealer or certain of its employees have given contributions to, or solicited or coordinated contributions for, issuer officials who can influence the award of municipal securities business. Petitioner contends that the Rule violates his First Amendment rights, and impinges on state authority over elections in violation of the Tenth Amendment.

1. The Securities and Exchange Commission and the MSRB, among others, regulate the market for municipal securities. The MSRB is the self-regulatory organization established by Congress to propose and adopt rules governing the operations of municipal securities dealers. 15 U.S.C. 78*o*-4(b)(2). Those rules do not become effective unless approved by an order of the Commission. The MSRB is specifically charged with making rules to prevent fraudulent and manipulative acts and practices, to help perfect the mechanism of a free and open market, and to promote just

and equitable principles of trade. 15 U.S.C. 78*o*-4(b)(2)(C). As the Commission observed, Congress created the MSRB and gave it and the Commission rulemaking authority in large measure because Congress believed "that the lack of federal regulation * * * represents a serious threat to the integrity of the capital-raising system upon which local governments rely to finance their efforts." Pet. App. B28 n.53 (quoting *Securities Acts Amendments of 1975: Report of the Committee on Banking, Housing, and Urban Affairs, to Accompany S. 249*, S. Rep. No. 75, 94th Cong., 1st Sess. 38 (1975)). Dealers must be registered with the Commission and must conduct their business in compliance with the rules of the MSRB. See Securities Exchange Act of 1934, §§ 15(a)(1), 15B(a), (b) and (c)(1); 15 U.S.C. 78*o*(a)(1), 78*o*-4(a), (b) and (c)(1).

Municipal securities are, generally speaking, obligations of States and their political subdivisions or instrumentalities. Securities Exchange Act § 3(a)(29), 15 U.S.C. 78c(a)(29). There are approximately 1.3 million municipal securities issues outstanding, with a total value of more than $1.2 trillion; in 1993 alone, there were 17,000 new issues, with a face value of $335 billion. Pet. App. B4-B5. Approximately 70% of those securities are held by or on behalf of members of the public, either individually or through mutual or money market funds. *Id.* at B3.

Municipal securities are typically sold by the issuer to dealers, who act as underwriters and expect to resell the securities to the investing public at a profit. See generally Pet. App. B5-B9.[1] "Under-

---

[1] Rule G-37 applies to "broker[s]," "dealer[s]" and "municipal securities dealer[s]," as those terms are defined in Sections

writers perform essential functions in offerings by structuring the offering and preparing disclosure documents that form the basis of marketing the offering to the public." *Id.* at B28. Underwriters are required to have a reasonable basis for recommending securities and must review professionally the accuracy of statements made in offering documents. *Id.* at B28 n.54.

Historically, most issuers selected dealers through competitive bidding. In recent years, however, negotiated underwritings, in which the dealer is selected by the issuer without competitive bidding, have become more common, and as of 1993 they comprised 80% of all underwritings. Pet. App. B5-B9. Negotiated underwritings present a far greater opportunity than do competitive underwritings for consideration of non-objective, non-merit based criteria, and therefore "present greater risk of abuse in the underwriter selection process." *Id.* at B8 (footnote omitted). The most widespread potential for abuse is presented by pay-to-play. Complaints about pay-to-play have received considerable attention from Congress, the Commission, the MSRB, the securities industry, the media and the public, "reflecting concerns regarding the integrity, fairness, and sound operation of the municipal securities market." *Id.* at B9-B12; see C.A. App. 1384-1483 (press reports reviewed by Commission).

2. The MSRB proposed Rule G-37 as a means of eliminating pay-to-play, and the Commission gave the

---

3(a)(4), (5), and (30) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(4), (5) and (30). References herein to "dealers" or "underwriters" encompass brokers, dealers, and municipal securities dealers.

approval required by Section 19(b) of the Securities Exchange Act, 15 U.S.C. 78s(b) (1988 & Supp. V 1993), for the Rule to become effective. Petitioner challenges sections (b) and (c) of the Rule, which are designed to sever the link between the award of municipal securities business and the making or soliciting of campaign contributions. Pet. App. A3-A4, G3-G4.[2]

Section (b) imposes a limitation on the business activities of dealers who make certain campaign contributions. It provides, in part:

> No broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer * * *.

See Pet. App. G3-G4; C.A. App. 644-650 (reprinting Rule). Section (b) includes an exception, however, allowing municipal finance professionals (*i.e.*, certain employees of municipal securities dealers) to contribute not more than $250 per candidate, per election, to candidates for whom they are entitled to vote.[3]

---

[2] Section (a) of Rule G-37 states the Rule's purpose and intent. Section (d) is a "loophole closer," providing that no dealer or municipal finance professional shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of section (b) or (c) of the Rule. Sections (e) and (f) contain disclosure provisions. No sections other than (b) and (c) are at issue here. See Pet. i, 6 n.6.

[3] The exemption is limited to candidates for whom the professional is entitled to vote because, "[a]lthough an individual may have a legitimate interest in making contributions to candidates for whom she is ineligible to vote, there is a greater risk in such circumstances that the contribution is motivated by

Section (g)(vii) defines "municipal securities business" generally to exclude business done on a competitive bid basis. C.A. App. 648.[4]

Section (c) provides that no dealer

> shall solicit any person or political action committee to make any contribution, or shall coordinate any contributions to an official of an issuer with which the [dealer] is engaging or is seeking to engage in municipal securities business.

Pet. App. G3-G4.

In approving Rule G-37, the Commission found that the widespread existence of pay-to-play "substantially undermine[s] the integrity of the municipal securities market." Pet. App. B3. Pay-to-play may result in business being awarded to dealers "based on their history of contributions or political contacts, rather than their expertise or competence." *Id.* at B29. The Commission concluded that pay-to-play interferes with the mechanism of a free and open market because it raises artificial barriers to competition for those firms that either cannot afford or decide not to make political contributions. *Id.* at B32. The practice is contrary to just and equitable principles of trade

---

an improper attempt to influence municipal officials." Pet. App. B53.

[4] Section (b) treats contributions by municipal finance professionals associated with a dealer, as well as contributions by any political action committee that the dealer controls, as equivalent to contributions by the dealer itself. Section (g)(vi) defines an official of an issuer as anyone who, at the time of the contribution, was an incumbent, candidate or successful candidate for either an elective office of the issuer that has authority to hire or influence the hiring of dealers, or an elective office with authority to appoint such an issuer official. C.A. App. 648.

because dealers may receive different rewards for doing the same work, based on whether they made political contributions. *Id.* at B33.

The Commission also noted the risks pay-to-play imposes on investors, because an underwriter selected on the basis of political contributions rather than on merit alone may fail to carry out its obligations fully to investigate and disclose the creditworthiness of the issuer, either because political considerations compromise the underwriter's ability to investigate the issuer objectively, or because it is not competent. Pet. App. B28-B30. And pay-to-play causes an appearance of corruption: opportunities for political influence in underwriter selection create the appearance of conflicts of interest between the underwriter's obligations to its investor customers and its allegiance to the issuer official who selected the underwriter. *Id.* at B30-B31. The Commission concluded that that perception undermines public confidence in the integrity of the market.

3. a. Petitioner was until recently Chairman of the Alabama Democratic Party, in which capacity he raised and distributed campaign funds for state and local officials; he was at the same time a municipal securities dealer, in which capacity he approached state and local officials in Alabama, seeking and obtaining municipal securities business for his firm. Pet. App. A4, D3-D4. On April 26, 1994, petitioner sought judicial review, pursuant to 15 U.S.C. 78y (1988 & Supp. V 1993), of the Commission's decision to approve the Rule. Petitioner claimed that by forcing him to choose between making (or soliciting) political contributions and engaging in certain municipal securities business, the Rule unconstitutionally impairs his First Amendment rights. Petitioner also

asserted that the Rule impermissibly interferes with the power of the States to control their own elections, in violation of the Tenth Amendment.

b. The court of appeals unanimously rejected each of petitioner's challenges and denied the petition. Pet. App. A1-A27. The court denied rehearing, with no judge requesting a vote on the suggestion of rehearing en banc. *Id.* at F1-F2.

The court of appeals assumed without deciding that strict constitutional scrutiny applies, and held that Rule G-37 withstands such scrutiny because the Rule is narrowly tailored to advance the compelling governmental interest of protecting the integrity of the municipal bond market. Pet. App. A13-A24.[5] The court of appeals found compelling the interests in "(1) protecting investors in municipal bonds from fraud and (2) protecting underwriters of municipal bonds from unfair, corrupt market practices," reasoning that the interest in "clean bond markets" is as strong as the interest in "clean elections" that this Court repeatedly has held to be compelling. *Id.* at A14 (citing cases). The court explained: "one of the primary reasons people object to bought elections is that a bought politician tends to make distorted choices, and the public's concern about a particular type of

---

[5] The court observed that the Commission approved the Rule solely for "the purpose of preventing corrupt bond markets"—a purpose that "might logically be considered unrelated to the suppression of speech" and thus warrant intermediate rather than strict scrutiny. Pet. App. A12. But the court of appeals concluded that, in the absence of definitive guidance as to whether an anti-corruption goal is content-based, the Rule should be analyzed under strict scrutiny. *Id.* at A8-A13. In this brief, we shall proceed on that assumption, without foreclosing the applicability of intermediate scrutiny.

distorted choice (the choice of bond underwriter) does not logically stand on a lower plane than its concern about bought politicians generally." *Ibid.*

The court rejected petitioner's contention that Rule G-37 does not serve the interests the Commission asserted. Pet. App. A15-A21. It concluded that the need for Rule G-37 had been adequately demonstrated: "[U]nderwriters' campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity." *Id.* at A15. The court noted that petitioner's own statements in a radio interview drew a connection between campaign contributions and the award of municipal bond business, *id.* at A15-A16, and that the Commission had before it information on "[s]pecific abuses [that] have been alleged in several state and local governments," *id.* at A16 (quoting *SEC Approval Order* at 8-11 (Pet. App. B9-B12)). The court further concluded that Rule G-37 advances "the Commission's goals of 'perfecting the mechanism of a free and open market' and promoting 'just and equitable principles of trade'" by eliminating artificial barriers to competition and assuring an equitable allocation of underwriting assignments. Pet. App. A17-A18.[6]

---

[6] Although the court understood that Rule G-37 serves the Commission's interest in protecting the municipal securities market from corruption, it did not believe that the Rule similarly serves the Commission's interest in protecting investors. In the court's view, dealers' existing interests in avoiding fraud liability and safeguarding their own reputations adequately protect the investing public, and "[n]either interest

Finally, the court held that Rule G-37 is narrowly tailored to further the interests it identified. Pet. App. A21-A24. Rule G-37 is "closely drawn" to "constrain[] relations only between the two potential parties to a quid pro quo," and, "[e]ven then, the rule restricts a narrow range of their activities for a relatively short period of time." *Id.* at A22-A23. The court noted that the Rule applies only to negotiated and not to competitively bid underwriting business. *Id.* at A22 n.5. Section (b) bars a dealer from seeking or doing business with an issuer only for two years following its contribution to officials of that issuer, and section (c) bars such activity only during the time that the dealer is soliciting or coordinating contributions for those officials. Rule G-37 also does not restrict municipal finance professionals from "the vast majority of political activities, including making direct expenditures for the expression of their views, giving speeches, soliciting votes, writing books, or appearing at fundraising events." *Id.* at A23. The court rejected petitioner's contention that less restrictive alternatives, such as exclusive reliance on the Rule's unchallenged disclosure provisions, would suffice, and concluded that "none of the alternatives presented would be even *almost* equally effective." *Id.* at A21-A22.

Petitioner's Tenth Amendment challenge was, in the court of appeals' view, "meritless," because Rule G-37 does not regulate States directly and does not compel States to regulate private parties. Pet. App.

---

would be diminished merely by an underwriter's use of sleazy means to secure the contract." Pet. App. A17. The court concluded, however, that the interest in protecting the market sufficed to support the Rule. *Id.* at A15-A21.

A26 (citing *New York* v. *United States*, 505 U.S. 144 (1992)). Rather, it regulates "private persons in their conduct of interstate trade in municipal securities." Pet. App. A26. In these circumstances, the court concluded, Rule G-37 "does not have anything resembling the kind of preemptive effect on States' ability to control their own election processes that might be perceived as 'destructive of state sovereignty.'" *Ibid.* (quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985)).

ARGUMENT

Rule G-37 is a narrowly drawn provision aimed at eradicating the well recognized corruption that pay-to-play practices bring to the municipal securities market. The constraints the Rule places on the expression-related activities of certain regulated securities professionals are carefully limited, and are justified by the compelling goals it serves. Rule G-37 restricts the activities of private individuals, not of States, and thus does not implicate Tenth Amendment concerns. The decision below upholding the Rule is correct and neither raises important unresolved issues, nor conflicts with any decision of this Court or any other court of appeals.[7]

1. The centerpiece of petitioner's argument is that Rule G-37 imposes unjustified restraints on munici-

---

[7] A constitutional challenge to a MSRB rule may be raised not only, as here, on judicial review of the Commission's decision to approve the rule, but also, where appropriate, in an action to enforce the Rule. An appeal in such an action could be heard by a court of appeals other than the Court of Appeals for the District of Columbia Circuit. See 15 U.S.C. 78y (1988 & Supp. V 1993), 78aa.

pal securities dealers' rights to express themselves in the political arena. Pet. 10. The Rule's restrictions are, however, supported by this Court's decisions regarding campaign contribution and solicitation, including *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which upheld against a First Amendment challenge campaign contribution limits substantially broader than those at issue here.

a. The Rule's modest restraints on expression and association are, as the court of appeals correctly held, justified by the compelling need to cleanse the municipal securities market of political favoritism. As the Commission and the court of appeals found, the corruption arising from pay-to-play distorts the municipal securities market because it results in business being awarded based on political contributions rather than market forces driven by factors such as cost and quality of dealers' service. By effectively requiring political contributions from dealers seeking to act as municipal securities underwriters, and channelling business to large contributors, pay-to-play interferes with the fairness of the enormous and vitally important market for municipal securities.

Preventing corruption and the appearance of corruption have been repeatedly recognized as interests sufficiently compelling to justify appropriate restrictions on First Amendment interests. See, *e.g.*, *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985); *Buckley*, 424 U.S. at 25-27, 30. Contributions that are given to secure a *quid pro quo* in terms of municipal securities business from current and potential office holders undermine the integrity and competitive character of the municipal securities market.

Buckley's reasoning regarding campaign contributions also applies to solicitation and coordination activities. Section (c) is a prophylactic rule serving the same purpose as section (b). Section (c) prohibits dealers and municipal finance professionals from soliciting or coordinating contributions to specified officials of issuers with which the dealer is at that time engaging, or seeking to engage, in municipal securities business. The value of solicitation of contributions to a candidate may often essentially equal the value of direct contributions, because in both instances the candidate receives funds that he or she can directly control to advance the campaign. That value is the source of the candidate influence that solicitation purchases for the dealer, and solicitation thus presents the same dangers as are caused by political contributions. See *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 207 (1982) (*NRWC*) ("substantial aggregations of wealth" through solicitation "could be used to incur political debts from legislators who are aided by the contributions"); *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) (reaffirming constitutionality, in the interests of government impartiality and its appearance, of provisions preventing federal government employees from "actively participating in fund-raising activities for a partisan candidate or political party").

The appearance of corruption can be as harmful as the reality of corruption caused by contributions or solicitation. See *Buckley*, 424 U.S. at 27; *NRWC*, 459 U.S. at 210 (compelling interest in preventing appearance of corruption of federal electoral process). Public confidence in the municipal securities market is essential to the ability of state and local govern-

ments to raise capital in that market in order to carry out their important public functions. Rule G-37 was promulgated with respect to an industry where the need for regulation in furtherance of the highest ethical standards is well recognized. See, *e.g.*, *United States* v. *Naftalin*, 441 U.S. 768, 774-776 (1979).[8]

Petitioner contends (Pet. 16-17) that the Commission has not identified specific instances in which campaign contributions were a *quid pro quo* for consideration for or award of municipal securities business. See Pet. App. A16, B9-B12. But as this Court has recognized, "the scope of such pernicious practices can never be reliably ascertained," *Buckley*, 424 U.S. at 27, and, moreover, preventing the appearance as well as the reality of corruption is a compelling interest, *id.* at 26-27, 30. The record before the Commission established that there is virtually unanimous consensus among professionals and others knowledgeable in the municipal securities field that pay-to-play is a widespread problem. See C.A. App.

---

[8] The integrity of the municipal securities market is also a matter of substantial and legitimate concern to investors. The court of appeals quoted with approval the Commission's conclusion that, "if 'pay to play' is the determining factor in the selection of an underwriting syndicate, an official may not necessarily hire the most qualified underwriter for the issue." Pet. App. A17 (quoting *id.* at B32). When market forces are thus distorted, investor confidence in the market is impaired. Moreover, investors may suffer losses if underwriters who obtain business based on politics rather than skill fail properly to assess an offering's creditworthiness. The court of appeals did not, however, rely on the risk of harm to investors as a rationale supporting Rule G-37, see *id.* at A16-A17, and the compelling interest in preventing corruption (and the appearance of corruption) that distorts the market and prevents fair competition suffices to support the Rule, *id.* at A17-A18.

663-667, 1106-1108. As the court of appeals observed, petitioner himself acknowledged in a radio interview that giving or raising funds "does assure you at least you can get access to someone's office," that "most likely [state and local officials] are gonna call somebody who has been a political contributor," and that, other things being equal, officials will give business to their "friends" who have contributed. Pet. App. A15 (citing *Morning Edition: SEC Halts Political Campaign Funding from Wall Street* (National Public Radio broadcast, June 1, 1994)). The court correctly concluded that "no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." Pet. App. A16 (citing *NRWC*, 459 U.S. at 210).

b. Rule G-37 is narrowly tailored, placing only a modest burden on expressive conduct in order to serve the compelling interest in avoiding corruption. Rule G-37's burdens are significantly lighter than those imposed by the campaign contribution ceiling upheld in *Buckley* v. *Valeo*, *supra*. Like the contribution limit sustained in *Buckley*, section (b) of Rule G-37 "entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21; see also Pet. App. A7. A campaign contribution limit is generally a minimal and indirect restraint on communication, and does not infringe the contributors' freedom to discuss candidates and issues. 424 U.S. at 21. The statutory provision at issue in *Buckley* placed a limit applicable across-the-board to contributions by *any* individual in *any* federal election. Rule G-37, by contrast, applies *only* to dealers and associated municipal finance professionals, and *only* to contributions to officials of

issuers with which the dealers engage in municipal securities business, in order to address in a focused manner the risk of corruption arising from their special business relationship to issuers. As this Court has repeatedly acknowledged, those who choose to participate in a closely regulated industry have more reason than do members of the general public to expect some impacts upon their rights and privileges. Cf. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989).[9]

The narrow manner in which both section (b) and section (c) are drawn leaves most political expression and association unaffected. The Rule applies only to limit dealers' contributions to and solicitation or coordination of contributions for officials of issuers with which they do (or seek to do) business; the dealers remain free to contribute money to or solicit contributions for any other campaign. It also permits a dealer to contribute money to and solicit for the campaigns of officials of issuers with which the dealer does business, provided that the business is granted based on competitive bids rather than through negotiated arrangements. Furthermore, municipal finance professionals may contribute up to $250 per candidate, per election, to any official for whom they are eligible to vote, even if the dealer with whom they are associated engages in municipal securities business with the issuer that employs that official. And the Rule is temporally limited: under section (b),

---

[9] Rule G-37's narrow focus on municipal securities dealers and the risks created by their business relationships with issuers distinguishes this case from *Carver* v. *Nixon*, 72 F.3d 633 (8th Cir. 1995), pet. for cert. pending, No. 95-1258 (filed Feb. 7, 1996), which struck down Missouri's across-the-board campaign contribution limits.

dealers may at any time choose to contribute to the campaigns of officials of an issuer, and although they then must refrain from doing municipal securities business with that issuer for two years, they may resume such business thereafter; under section (c), dealers may solicit and coordinate fundraising for an issuer official at any time during which the dealer is not doing business with, or seeking business from, the issuer.

Rule G-37 does not restrict dealers from continuing to express their support for a candidate in ways other than by contribution or solicitation, such as through one-on-one discussions, speeches, leaflets, letters, or written or broadcast editorializing. Dealers thus remain free in virtually every way to urge others to support a candidate—and to spend or solicit money for such efforts—as long as they do not contribute to the candidate, or ask for or coordinate contributions for the candidate.[10]

In that regard, a crucial limitation on Rule G-37 is that it leaves covered persons free to make unlimited *independent* expenditures in favor of candidates with whom they do (or may seek to do) business—*i.e.*, expenditures made without consultation or coordina-

---

[10] Petitioner complains (Pet. 10) that Rule G-37 prevents him from saying that a "candidate 'needs your financial support.'" But such a statement, like a contribution, is only an indirect expression of support for the candidate. See *Buckley*, 424 U.S. at 21. The Rule leaves dealers and municipal finance professionals free to express their support directly and to encourage others to support any candidate; they are free to say, for example, "I support candidate X, and you should, too." They are restricted only from asking for and coordinating financial contributions to the candidate. See Pet. App. A23-A24, C7-C8, D12-D13.

tion by a candidate or the candidate's campaign organization. Pet. App. B39; cf. 2 U.S.C. 431(17). Covered persons may also solicit contributions toward their own independent expenditures. The Court in *Buckley* viewed independent expenditures as implicating substantially greater expressive interests than contributions (and held that the independent expenditure limit before it in that case was unjustified in view of such expenditures' "diminished potential for abuse"). 424 U.S. at 47.

The type of restraint Rule G-37 imposes is not novel. Restraints on political contributions and on solicitation of contributions are imposed on corporations and government contractors under both federal and state law; federal law, for example, bans contributions by government contractors, and prohibits any solicitation from government contractors.[11] Thus,

---

[11] Federal law prohibits federal campaign contributions by federal contractors, and prohibits all persons from soliciting for federal campaigns from federal contractors. See 2 U.S.C. 441c(a)(1) and (2); 11 C.F.R. 115.2. Several States prohibit corporations or members of regulated industries from making campaign contributions in and/or soliciting for state elections. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 16-919, 16-921(B) (1995); Conn. Gen. Stat. Ann. § 9-333*o*(a) (West 1995); N.D. Cent. Code §§ 16.1-08-02(1), 16.1-08-01(10) (1991); Pa. Stat. Ann. tit. 25 § 3253 (1994); S.D. Codified Laws Ann. § 12-25-2 (1995); W. Va. Code § 3-8-8 (1994); see also W. Va. Code § 3-8-12(d) and (h) (1995); Wis. Stat. Ann. §§ 11.29, 11.38 (West 1986 & Supp. 1995); Wyo. Stat. § 22-25-102 (1992); see also 1995 Ct. ALS 188 (to be codified at Conn. Gen. Stat. Ann. § 1-84(n)) (prohibiting State from purchasing investment services from firms that have made contributions to or solicited contributions on behalf of candidates for state treasurer); Fla. Admin. Code Ann. r. 19A-6.004 (prohibiting award of municipal securities business to firms that make political contributions to the Governor or to cabinet members); Fla. Admin. Code Ann. r. 9I-16.004(e) (pro-

both federal and state laws embody the judgment that making contributions to government officials from whom one seeks business presents a serious ethical conflict.[12]

2. Petitioner also contends (Pet. 18-20) that Rule G-37 violates the Tenth Amendment, because, in his view, it regulates core sovereign activities of the States without an "unmistakably clear" congressional statement of intent to do so. Petitioner acknowledges that Congress has the authority to regulate the conduct at issue here, but challenges Rule G-37 on the ground that it was promulgated by the Commission.

The court of appeals correctly rejected petitioner's Tenth Amendment claim, however, recognizing that Rule G-37 simply does not affect "states' ability to control their own election processes." Pet. App. A26. No clear congressional statement is required here, because Rule G-37 regulates private conduct, not state activities. The Court in *Gregory* v. *Ashcroft*,

---

hibiting investment firms and law firms and their officers, directors, and employees that make contributions to or engage in fundraising for state-level candidates from competing for business from the Florida Housing Finance Agency).

[12] There is no reason for the Court to hold this case pending the disposition of *FEC* v. *Colorado Republican Campaign Comm.*, 59 F.3d 1015 (10th Cir. 1995), cert. granted, 116 S. Ct. 689 (1996) (No. 95-489), which involves limits on coordinated expenditures by political parties for public advertising in connection with federal election campaigns, not limits on individual municipal securities dealers' contributions to and solicitation for campaigns of state and local officials of issuers of municipal securities with whom they do business. Resolution of the issues presented in *Colorado Republican Campaign Comm.* is unlikely to have any bearing on the questions presented in this case.

501 U.S. 452 (1991), held that the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621-634 (1988 & Supp. V 1993), could not, in the absence of "unmistakably clear" language in the Act, be applied to Missouri's mandatory-retirement rule for state judges, 501 U.S. at 460 (quoting *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 243 (1985)). The ADEA's text did not make clear whether it applied to state judges, and the Court thus held it inapplicable because to do otherwise would trench on States' authority "to determine the qualifications of their most important government officials." 501 U.S. at 463. Rule G-37, by contrast, does not affect the States' ability to select their officials; rather, it regulates the activities of municipal securities dealers engaged in interstate commerce. There is no suggestion in the record that Rule G-37 would impair election financing or any other aspect of state or local elections.[13] The Rule's potential indirect impact on the funding stream from municipal securities dealers to state candidates for offices responsible for issuing municipal securities is, in any event, insufficient to bring the rule within the ambit of the Tenth Amendment.[14]

---

[13] There was scant objection before the Commission—and there was none in the court below—from States or localities regarding the Rule's effect on federal-state relations. Some commentators suggested to the Commission that federal regulation was unnecessary or inappropriate because the pay-to-play problem should be handled at the state or local level, but none suggested that the Tenth Amendment prohibited the MSRB or the Commission from adopting rules on this subject. See C.A. App. 1110 n.16 (citing comments on federalism concerns).

[14] Petitioner's contention (Pet. 19-20) that the Commission's approval of this Rule was a "reversal of course" from the Com-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

RICHARD H. WALKER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ERIC SUMMERGRAD
Principal Assistant General Counsel

MARK PENNINGTON
Senior Litigation Counsel
Securities and Exchange Commission

MARCH 1996

---

mission Chairman's testimony before Congress is incorrect. The Chairman made clear in his testimony that the MSRB's August 1993 draft Rule, which would have prohibited contributions for the purpose of obtaining business, was an approach that "represents a solid step in the right direction." C.A. App. 182. The Commission's order is fully consistent with the Chairman's representations to Congress.